

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUE

The issue is whether appellant has met her burden of proof to establish modification of the July 28, 2017 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 16, 2006 appellant, then a 49-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2006 she experienced left shoulder and neck pain after pulling bags onto a carousel while in the performance of duty. She stopped work on August 16, 2006 and returned to work with restrictions on June 8, 2008. OWCP accepted the claim for left shoulder sprain, cervical sprain, displacement of a cervical intervertebral disc without myelopathy C3-6, bulging discs C2-T1, and brachial neuritis or radiculitis. It paid appellant wage-loss compensation on the periodic rolls from October 1, 2006 to June 7, 2008, on the supplemental rolls from June 8, 2008 to June 30, 2012, and again on the periodic rolls as of July 1, 2012.

On September 4, 2013 OWCP referred appellant for vocational rehabilitation services. Appellant completed training in computer skills as of April 22, 2014, with viable job goals of customer service representative and receptionist, positions listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) bearing DOT No. #239.362-014 and No. #237.367-038, respectively. The vocational rehabilitation counselor provided job placement assistance beginning June 2014.⁵

A magnetic resonance imaging (MRI) scan of the cervical spine obtained on March 14, 2014 compared to a prior study from April 11, 2012, demonstrated a disc bulge at C2-3 with right-

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the December 14, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁴ Docket No. 18-1197 (issued April 30, 2020).

⁵ In a letter dated August 6, 2014, OWCP requested that Dr. Craig Lichtblau, a physician Board-certified in physical medicine and rehabilitation, clarify whether appellant was able to perform the duties of a customer service representative or receptionist. On August 28, 2014 Dr. Lichtblau confirmed that appellant was able to work as a receptionist, appointment clerk, and information clerk within her medical restrictions of performing occasional fingering/typing for eight hours a day in a sedentary position.

sided facet spurring and subchondral cyst in the right facet joint, as well as a new right posterior annular tear since the prior study; posterior disc herniation with spurring, anterior cord impingement, and central stenosis at C3-4, similar to prior study; posterior disc herniation with spur eccentric to the right at C4-5, similar to prior study; posterior disc herniation with extrusion and anterior cord impingement at C5-6, similar to prior study; posterior disc herniation with spur slightly eccentric to the left at C6-7, similar to prior study; a disc bulge at C7-T1, similar to prior study; and posterior disc herniation eccentric to the right with right anterior cord impingement at T2-3.

On July 21, 2016 OWCP referred appellant to Dr. David B. Lotman, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated August 24, 2016, Dr. Lotman advised that, due to her cervical and left shoulder pathology, she was unable to return to her date-of-injury position as a transportation security screener. In an attached work capacity evaluation (Form OWCP-5c) report, he indicated that appellant had work restrictions of no reaching above the shoulder, climbing, or bending/stooping, as well as no pushing, pulling, or lifting more than two hours per day of up to 20 pounds.

On February 15, 2017 the vocational rehabilitation counselor completed a job classification (Form CA-66) for the position of customer complaint clerk. The position required occasional reaching, handling, and fingering. In a vocational rehabilitation memorandum dated February 16, 2017, OWCP's vocational rehabilitation specialist noted that the positions of customer complaint clerk, appointment clerk, receptionist, and other similar full-time sedentary jobs remained both vocationally suitable and were in sufficient numbers that they were reasonably available in her local area.

In a letter dated June 14, 2017, OWCP notified appellant of its proposed reduction in her wage-loss compensation pursuant to 5 U.S.C. §§ 8106 and 8115. It advised that the medical evidence of record established that she was only partially disabled. OWCP found that the position of customer complaint clerk was medically and vocationally consistent with appellant's medical limitations, skills and work experience. It determined that she was capable of earning wages at the rate of \$398.40 per week as a customer complaint clerk and that the position was reasonably available within her commuting area. OWCP provided an attachment detailing the application of the *Shadrick* formula.⁶ It afforded appellant 30 days to submit evidence and argument if she chose to contest the proposed action.

In a report dated June 29, 2017, Dr. Lichtblau advised that appellant could perform light-duty employment alternating sitting and standing as needed, avoiding repetitive bending, kneeling, squatting, crawling, climbing, running, and jumping. Appellant was to refrain from reaching overhead frequently.

By decision dated July 28, 2017, OWCP reduced appellant's compensation effective July 29, 2017 based on her capacity to earn wages as a customer complaint clerk at the rate of \$398.40 per week. It found that the evidence of record demonstrated that she was vocationally and physically capable of working as a customer complaint clerk.

⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

On August 16, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

On November 28, 2017 OWCP authorized arthroscopic left shoulder surgery. On November 30, 2017 Dr. Ryan Simovitch, a Board-certified orthopedic surgeon, performed a left shoulder rotator cuff repair, subacromial decompression with acromioplasty, and debridement.

The hearing was held on January 5, 2018. During the hearing, counsel argued that appellant's recent surgery qualified as changed circumstances warranting a modification of the LWEC determination of July 28, 2017 while she recovered from surgery. The hearing representative noted that there was no medical evidence of record addressing the period of disability related to the surgery. She held the case file open 30 days for submission of additional evidence.

In a report dated January 22, 2018, Dr. Simovitch advised that appellant had undergone shoulder surgery nine weeks earlier. He noted that she complained of continuing pain radiating into her neck. Dr. Simovitch discussed appropriate use of a sling and the necessary period of postoperative convalescence. Appellant also submitted operative reports and reports prior to her surgery on November 30, 2017.

By decision dated February 7, 2018, the hearing representative affirmed the July 28, 2017 LWEC determination, finding that both the medical and vocational evidence supported that appellant had the ability to perform the position of customer complaint clerk.⁷

In a report dated February 8, 2018, Dr. Lichtblau noted that, due to appellant's recent surgery, extreme pain, and limited range of motion, she should refrain from participating in any type of repetitive activity and should work at the sedentary level.

On March 2, 2018 appellant, through counsel, requested reconsideration of the February 7, 2018 decision. With the request, she submitted surgical records related to her procedure on November 30, 2017, including the previously-submitted operative report of that date, as well as documents relating to surgical orders and authorization by OWCP that were previously of record. Appellant also submitted numerous reports from physical therapists.

In a report dated March 12, 2018, Dr. Simovitch noted that appellant had been attending physical therapy. On examination, he found well-healed incisions with supple range of motion. Dr. Simovitch advised that appellant had slowly improved. He recommended that she return to Dr. Lichtblau for pain management.

By decision dated April 16, 2018, OWCP denied modification of its February 7, 2018 decision. An MRI scan of the cervical spine obtained on June 6, 2018 compared to a prior study from March 14, 2014, demonstrated a disc bulge at C2-3, noted on prior study; posterior disc

⁷ The hearing representative noted that counsel had contended during the hearing that modification of the LWEC determination should be considered in view of her left shoulder surgery. She found, however, that the relevant issue was whether appellant had established a recurrence of disability due to her surgery rather than modification of the LWEC determination. The hearing representative instructed OWCP to develop the issue of whether she had experienced a period of disability subsequent to her surgery.

herniation with spurring with central stenosis at C3-4, noted on prior study; posterior disc herniation with spurring eccentric to the right at C4-5, noted on prior study; posterior disc herniation with spurring and anterior cord impingement at C5-6, noted as similar to prior study; left posterior disc herniation with spurring with central stenosis at C6-7, noted on prior study; a disc bulge at C7-T1, noted as similar to prior study; and questionable anterior cord impingement at C3-4, not as well-appreciated on the current study as on the prior study.

In a report dated June 20, 2018, Dr. Simovitch diagnosed cervical stenosis with cervical radiculopathy and recurrent vertigo. On physical examination of the left shoulder, he observed limited range of motion and strength. Dr. Simovitch opined that appellant was unable to return to work without restrictions and advised that she had limited capacity to use the arms even at sedentary capacity at waist height.

A December 13, 2018 electromyography (EMG) and nerve conduction velocity (NCV) study report demonstrated normal findings.

In a functional capacity evaluation (FCE) dated January 9, 2019, Dr. Lichtblau diagnosed (1) a history of cervical and thoracic myofascial pain syndromes; (2) left shoulder sprain; (3) subjective complaints of upper extremity radicular pain; (4) history of C2-3, C6-7, and C7-T1 bulging discs and C3-4, C4-5, and C5-6 disc herniations; (5) history of C4-5 and C5-6 spondylosis and C4-5 disc space narrowing; (6) history of a C3-4 posterior disc herniation with central stenosis and worsening with a new annular tear since the prior study as indicated by the April 11, 2012 MRI scan; (7) history of C2-3 disc bulge with a new annular tear as indicated by the March 14, 2014 MRI scan; (8) history of biceps tendinopathy with chronic partial tearing and tenosynovitis with a type II/III anterior capsular insertional tear with acromioclavicular (AC) joint spurring in the subacromial and subdeltoid region with supraspinatus and infraspinatus tendinopathy and a subchondral cyst in the humeral head and bone contusion/stress reaction to the greater tuberosity and humeral neck; (9) a history of thin supraspinatus tendon with partial articular and bursal surface tears with a probable full-thickness tear at the insertion of the tendon of the humeral head with a small partial interstitial tear of the infraspinatus tendon; and acute functional decline secondary to chronic pain and depression secondary to numbers one through nine. Dr. Lichtblau attributed the diagnoses numbered one through four as secondary to injuries sustained in a work-related incident on August 9, 2006. He noted that there was close correlation between appellant's subjective complaints of pain, extremely limited flexibility, general decreased endurance, general weakness, extremity weakness, fatigue, and her functional ability. Dr. Lichtblau opined that she did not have the functional capacity to work four hours per day on an uninterrupted basis at that time and that she should be in a setting that allowed her to take breaks to change positions for positional comfort at will. He opined that appellant's work restrictions should include occasional bending, climbing protected heights, repetitive motions of the elbows, pushing, and pulling; avoiding repetitive bending, twisting, kneeling, squatting, crawling, climbing unprotected heights, repetitive reaching overhead, running, and jumping; and no bending at the waist while keeping her hips and knees extended. Dr. Lichtblau found that her residual physical functioning strength level from the floor-to-shoulders position was less than sedentary. He noted that appellant suffered from acute, intermittent exacerbations of chronic pain and discomfort and opined that she would be unable to maintain gainful employment in the competitive open labor market or in a sheltered environment with a benevolent employer secondary to acute intermittent exacerbations of chronic pain.

In a letter dated July 9, 2019, Dr. Lichtblau advised that appellant could work within the limitations set forth in the January 9, 2019 FCE. He noted that he had previously reported that, pursuant to her August 29, 2012 FCE findings, she had the functional capacity to work eight hours a day with restrictions. However, based on appellant's January 9, 2019 FCE, appellant did not have the functional capacity to work four hours a day. Dr. Lichtblau opined that her physical functioning strength level was less than sedentary position; however, he continued to recommend a return to work in a sedentary position, with restrictions. He indicated that appellant's present level of disability was a direct result of her work-related conditions.

In a report dated January 3, 2020, Dr. Simovitch examined appellant's left shoulder for complaints of increased pain. He related her physical examination findings and recommended a left reverse total shoulder arthroplasty.

Appellant, through counsel, filed a timely appeal to the Board. By decision dated April 30, 2020, the Board set aside the April 16, 2018 decision and remanded the case for further proceedings. The Board found that, as appellant had submitted evidence that she may have sustained increased disability due to left shoulder surgery, OWCP was required to evaluate the evidence to determine if modification of the LWEC determination was warranted.

By decision dated July 6, 2020, OWCP denied modification.

In an attending physician's report (Form CA-20) dated July 3, 2020, Dr. Lichtblau diagnosed cervical herniation at C3-4, C4-5, and C5-6 and left rotator cuff tear. He indicated that these conditions were caused or aggravated by the August 9, 2006 work-related incident by checking a box. Dr. Lichtblau noted that appellant had been disabled for many years and that a return to work was not expected.

On July 16, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on October 15, 2020. The hearing representative held the case record open for 30 days for submission of additional evidence.

In a progress report dated October 21, 2020, Dr. Lichtblau rendered the same diagnoses as in his January 9, 2019 FCE. Appellant complained of increased left shoulder and neck pain. On physical examination, Dr. Lichtblau noted tenderness to light palpation along her cervical paraspinal musculature with palpable muscle spasms and limited active range of motion of the cervical spine. He maintained appellant's work status/activity level as recommended in the FCE. In a progress report dated November 24, 2020, appellant noted no significant overall changes in her neck, left shoulder, and mid-back pain, with good days and bad days depending on her activity level.

By decision dated December 14, 2020, the hearing representative affirmed OWCP's July 6, 2020 decision, finding that appellant had not met her burden of proof to establish modification of the July 28, 2017 LWEC determination.

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.⁸ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed based on his or her LWEC.⁹ An employee's actual earnings generally best reflect his or her wage-earning capacity.¹⁰ Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.¹¹ But if actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or the employee has no actual earnings, then wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his or her disabled condition.¹²

Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.¹³ Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.¹⁴ OWCP's procedures provide that, "[i]f a formal [LWEC]" decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal [LWEC]."¹⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁶

⁸ *L.M.*, Docket No. 20-1038 (issued March 10, 2021); *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

⁹ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403.

¹⁰ *See L.M.*, *supra* note 8; *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

¹¹ *Id.*

¹² 5 U.S.C. § 8115(a).

¹³ *See M.F.*, Docket No. 18-0323 (issued June 25, 2019).

¹⁴ *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.8129(a) (June 2013); *D.T.*, Docket No. 18-0174 (issued August 23, 2019); *J.B.*, Docket No. 17-0817 (issued April 26, 2018); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

¹⁶ *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

ANALYSIS

The Board finds that this case is not in posture for decision.

Appellant has not alleged that the July 28, 2017 LWEC determination was in error or that she was vocationally rehabilitated. Instead, she has alleged that the July 28, 2017 LWEC determination should be modified due to a change in the nature and extent of her injury-related conditions.

On November 30, 2017 appellant underwent OWCP-authorized left shoulder rotator cuff repair, subacromial decompression with acromioplasty, and debridement. In a report dated February 8, 2018, Dr. Lichtblau noted that, due to appellant's recent OWCP-authorized surgery, extreme pain, and limited range of motion, she should refrain from participating in any type of repetitive activity and should work at the sedentary level. In a report dated June 20, 2018, Dr. Simovitch opined that appellant was unable to return to work without restrictions and advised that she had limited capacity to use the arms even at sedentary capacity at waist height. In an FCE dated January 9, 2019, Dr. Lichtblau attributed, among other diagnoses, accepted cervical disc herniations and disc bulges to injuries sustained in the accepted work-related incident of August 9, 2006. He opined that appellant did not have the functional capacity to work four hours per day on an uninterrupted basis at that time and that she should be in a setting that allowed her to take breaks to change positions for positional comfort at will. Dr. Lichtblau opined that her work restrictions should be updated. He stated that appellant's residual physical functioning strength level from the floor-to-shoulders position was less than sedentary. Dr. Lichtblau opined that she would be unable to maintain gainful employment in the competitive open labor market. In a letter dated July 9, 2019, he advised that appellant could work within the limitations set forth in the January 9, 2019 FCE and opined that she was able to return to work in a sedentary position, stating that her present level of disability was a direct result of her work-related conditions. Dr. Lichtblau continued to maintain her work status as in line with the January 9, 2019 FCE. In a report dated January 3, 2020, Dr. Simovitch recommended a left reverse total shoulder arthroplasty.

The Board finds that Drs. Lichtblau and Simovitch have provided opinions that appellant's current condition and disability is causally related to her accepted employment injury. It has been accepted that, once the work-connected character of any condition is established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.¹⁷ The Board further notes that Dr. Lichtblau attributed appellant's sedentary work restriction in part to her November 30, 2017 OWCP-approved left shoulder surgery.¹⁸ While Drs. Lichtblau and Simovitch reports are insufficient to meet her burden of proof to establish that the July 28, 2017 LWEC determination

¹⁷ See *Foy E. Thomas*, Docket No. 01-0500 (issued May 17, 2002). See also *Dennis J. Lasanen*, 41 ECAB 933 (1990) (where the Board remanded the case for a determination of whether appellant's recurrence of disability was a further medical complication flowing from the employment injury or whether it was caused by an independent intervening cause).

¹⁸ See *L.V.*, Docket No. 17-1260 (issued August 1, 2018); *S.C.*, Docket No. 16-1073 (issued July 13, 2017); *N.H.*, Docket No. 08-1503 (issued April 13, 2009); *Gary F. Voet*, Docket No. 98-1175 (issued May 23, 2000). Compare *C.W.*, Docket No. 07-1816 (issued January 16, 2009).

should be modified due to a change in the nature and extent of her injury-related conditions, they are sufficiently supportive of causal relationship between her current conditions and disability, OWCP-approved treatment of her accepted conditions, and the accepted August 9, 2006 incident to require OWCP to further develop the medical evidence.¹⁹

It is well established that, proceedings under FECA are not adversarial in nature and that while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has an obligation to see that justice is done.²⁰ On remand, OWCP should provide a statement of facts and refer appellant, together with the complete case record and questions to be answered, to a specialist in the appropriate field of medicine for a detailed opinion on any change in the nature and extent of her injury-related condition and injury-related disability such that the July 28, 2017 LWEC determination should be modified. After this and such other development as OWCP deems necessary, it should issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁹ See *S.C., N.H., id.*; *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *Virginia Richard (Lionel F. Richard)*, 53 ECAB 430 (2002); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

²⁰ *John J. Carlone, id.*

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: January 11, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board